FILED
JAN 17 1951
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 501 .

HARTFORD ACCIDENT AND INDEMNITY COMPANY,
of 110 William Street, New York City,
Petitioner,

—against—

PAULINE CASALINO.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK AND FOR STAY OF EXECUTION OF JUDGMENT.

WILLIAM J. JUNKERMAN,
Attorney for Petitioner,
80 Broad Street,
New York City.

JESSE S. RICHMAN,
Of Counsel.

THE COURT PRESS, N. Y. C.

INDEX.

PAGE

Petition for Writ of Certiorari to the Court of Appeals of the State of New York and for Stay of Execution of Judgment 1

Opinions of the State Court 2
Jurisdiction 2
Question Presented 2
Statutes Involved 2

The Manner in Which the Federal Questions Sought to Be Reviewed Were Raised in the State Courts 3
Statement of Facts 3
Reasons for Granting the Writ 5

1. The decision of the lower Court is contradictory to the decision of this Court in *Williams* v. *U. S. F. & G. Co.*, 236 U. S. 549, and a decision of the United States Court of Appeals, Second Circuit, in *In re Miller*, 105 Fed. 2nd 926 5

2. The decision of the lower Court permits the owner of a non-provable claim to share the assets with creditors who have sustained pecuniary loss, which is contrary to the intent of Congress 6

3. A decision of the highest state court perpetually enjoining a judgment creditor on the ground of a discharge in bankruptcy raises a federal question which may be reviewed by this Court 7

4. The decision of the lower Court is at variance with previous decisions of the highest court of the State of New York 8

PAGE

5. The importance of the decision sought to be reversed may be seen from the motion of the Excise Bond Underwriters and its twenty-eight member insurance companies, made at the same time as this petition. These insurance companies write insurance in practically every other state in the union and, since a great many of such states have alcoholic control laws, the losses referred to of these insurance companies are multiplied. Besides, there are numerous other companies writing excise bonds throughout the country affected directly by this decision 9

Conclusion 9

Motion to File a Brief as *Amicus Curiae* 11

Appendix A 15

Appendix B 16

TABLE OF CASES CITED:

Abelove, Matter of, 138 Misc. 242 5
Abramson, In re, 210 Fed. 878 (2nd Cir.) 5, 7
Arnold v. *Green*, 116 N. Y. 566 8
Audubon v. *Shufeldt*, 181 U. S. 577 7
Banca Commerciale Italiana Trust Co. v. *Clarkson*, 274 N. Y. 69 8
Birch, In re, 89 Fed. Supp. 249 7
Boynton v. *Ball*, 121 U. S. 457 7
Dunbar v. *Dunbar*, 190 U. S. 340 7
Gilchrist v. *Cotton*, 148 N. E. 435 7
Heiser v. *Woodruff*, 327 U. S. 726 7
Mead-Haskell, In re, 47 Fed. Supp. 997 7
Miller, In re, 105 Fed. 2nd 926 ..... 5, 6

PAGE

Palmer v. *Hussey*, 119 U. S. 96 7
Pease v. *Egan*, 131 N. Y. 262 8
People v. *Sheriff*, 254 N. Y. 527 8
Pittsburgh Westmoreland Coal Co. v. *Kerr*, 220 N. Y. 137 8

Shawsheen Dairy, In re, 47 Fed. Supp. 494, 51 A. B. R. (N. S.) 347 (1942) 7

Townsend v. *Whitney*, 75 N. Y. 425 8

U. S. F. & G. v. *Carnegie Trust Co., No. 2*, 161 App. Div. 429, aff'd on opinion below, 213 N. Y. 629 .. 5

Williams v. *U. S. F. & G. Co.*, 236 U. S. 549 ..... 5, 6
Woodruff v. *Heiser*, 150 Fed. 2nd 869 (10th Cir.) 7

OTHER AUTHORITIES CITED:

Judicial Code, Title 28, U. S. C. A., Sections 1257, 2104 and 2106 2

New York Alcoholic Beverage Control Law, Section 108 15

Title XI, U. S. C. A.:
Section 35 .....5, 15
Section 93J 2, 3, 6, 15

60 Corpus Juris:
Page 702 5
Page 751 5
Page 777 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. .

HARTFORD ACCIDENT AND INDEMNITY COMPANY,
of 110 William Street, New York City,
Petitioner,

—against—

PAULINE CASALINO.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK AND FOR STAY OF EXECUTION OF JUDGMENT.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner prays that a writ of certiorari be issued to review the final order and judgment of the Court of Appeals of the State of New York (fols. 133-143) rendered on October 19, 1950 (upon which a final order was entered in the office of the Clerk of the County of New York on the 31st day of October, 1950), which affirmed a judgment of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, entered on the 10th day of March, 1950 (fols. 124-126), affirming a judgment of Special Term of the Supreme Court of the State of New York, New York County, entered on

the 17th day of November, 1949 (fols. 10-17). Petitioner prays further that the execution of said judgment be stayed pending this review by this Court.

Opinions of the State Court.

Special Term rendered an opinion on an order granting the motion of Pauline Casalino to cancel and discharge a judgment previously entered in favor of the petitioner (fols. 14-17). The Appellate Division of the Supreme Court of the State of New York, First Judicial Department, and the Court of Appeals of the State of New York rendered no opinion.

Jurisdiction.

The jurisdiction of this Court is invoked under the Judicial Code, Title 28, U. S. C. A., Sections 1257, 2104 and 2106.

Question Presented.

The question presented is whether a penalty due the State of New York not provable in bankruptcy (Title XI, U. S. C. A., Section 93J) may become a judgment provable in bankruptcy in the hands of a subrogated surety.

Statutes Involved.

The pertinent statutory provisions are set forth in Appendix A to this petition.

The Manner in Which the Federal Questions Sought to Be Reviewed Were Raised in the State Courts.

At Special Term of the Supreme Court of New York County, the defendant moved to vacate a judgment in favor of petitioner on the ground that the defendant had been discharged in bankruptcy (fols. 18-36, 104-108).

Petitioner opposed the motion on the ground that the judgment was not provable in bankruptcy (Title XI, U. S. C. A., Section 93J) (fols. 37-102).

The motion was granted and the Court rendered an opinion stating that the judgment was dischargeable in bankruptcy (fols. 14-17). See Appendix B to this petition.

The only question involved was a federal one, namely: Was the judgment dischargeable in bankruptcy?

Appeals followed to the Appellate Division, First Department and to the Court of Appeals, and both courts unanimously affirmed without opinion.

The amended remittitur issued by the Court of Appeals states that the federal questions here sought to be raised were considered by that Court (fols. 140-143).

Statement of Facts.

On July 1, 1934, Pauline Casalino procured a liquor license from the New York State Liquor Authority and posted a surety bond in the penal sum of $1,000 obtained from the Hartford Accident & Indemnity Company, the petitioner herein (fols. 23-24).

Thereafter, Pauline Casalino was charged with a violation of Section 108 of the Alcoholic Beverage Control Law and, after a hearing before the Alcoholic Beverage Control Board, on May 14, 1935 her license was revoked and her bond forfeited (fols. 61-64).

On October 8, 1935, demand was made on the surety for payment of the sum of $1,000, the penal sum provided for in the said bond (fols. 65-68), and on May 18, 1936 the said sum was paid by the surety to the State (fols. 70-72).

Suit was commenced against Pauline Casalino for the recovery of said sum and on September 3, 1936 judgment was entered in favor of the Hartford Accident & Indemnity Company in the New York County Clerk's Office for $1,017.50 (fols. 24-25).

In 1942, Pauline Casalino filed a voluntary petition in bankruptcy listing the judgment of the Hartford Accident & Indemnity Company, and on August 11, 1942 she was discharged "from all debts and claims which are made provable by said Act against her estate, except such debts as are by said Act excepted from the operation of a discharge in bankruptcy" (fols. 27, 30-33).

On the basis of her discharge in bankruptcy, on October 1, 1949 Pauline Casalino moved to cancel the judgment of the surety and as previously stated the motion was granted (fols. 18-21, 14-17).

Reasons for Granting the Writ.

1. The decision of the lower Court is contradictory to the decision of this Court in *Williams* v. *U. S. F. & G. Co.*, 236 U. S. 549, and a decision of the United States Court of Appeals, Second Circuit, in *In re Miller*, 105 Fed. 2nd 926.

Title XI, U. S. C. A., Section 35, provides that only provable debts are discharged in bankruptcy. The claim of The People of the State of New York, being for a penalty, would not have been provable in bankruptcy and, therefore, was not affected by the discharge (*In re Abramson*, 210 Fed. 878; *Matter of Abelove*, 138 Misc. 242). The judgment creditor, on paying to The People of the State of New York the amount of the forfeited bond, became subrogated to the People's rights, under the doctrine of subrogation (*U. S. F. & G.* v. *Carnegie Trust Co., No. 2*, 161 App. Div. 429, 432, aff'd on opinion below, 213 N. Y. 629; see also, to the same effect, 60 C. J. at pp. 777, 702). The judgment creditor did not by subrogation acquire any greater rights than the People, whose claim it paid (60 C. J. 751), and if the People could not prove their claim neither could the judgment creditor.

Nor was the claim of the judgment creditor provable on the theory that the latter possessed a claim against the bankrupt for reimbursement based upon an express agreement in indemnity. In every case where a surety makes payment there is an agreement to indemnify, either express or implied. As the United States Court of Appeals, Second Circuit, said in the

Matter of Miller, 105 Fed. 2nd 926, at p. 929, in discussing *Williams* v. *U. S. F. & G. Co.*, 236 U. S. 549:

> "True, the bankrupt there had entered into a specific contract of indemnity, but the court states that this was no more than would have been implied under the circumstances."

To hold that a surety paying a claim possessed a claim against the bankrupt on the latter's indemnity agreement in addition to a claim as subrogee would give the surety in most cases two provable claims. That this would not be desirable was indicated in *Matter of Miller* (*supra*, at p. 929), where the Court said:

> "By such proof ample protection is accorded the surety without the danger of double proof."

The Court took the view that "a person secondarily liable proves only in the right of the creditor, not upon an agreement, express or implied, of indemnity," a doctrine "generally supported by commentators."

It follows that the only claim which the judgment creditor had against the bankrupt was as subrogee of the People's claim, and that, since the People had no right to prove their claim, the judgment creditor, as subrogee, was subject to the same disability.

2. The decision of the lower Court permits the owner of a non-provable claim to share the assets with creditors who have sustained pecuniary loss, which is contrary to the intent of Congress.

Congress specifically excluded penalties and forfeitures as provable claims (Title XI, U. S. C. A., Section 93J). The refusal of Congress to sanction

proof of such claims is based on the fact that these exactions are intended to punish the bankrupt, and allowing proof of such claims would punish only creditors and would relieve a criminal bankrupt of the burden of his wrongdoing. (*In re Abramson*, 2nd Circuit, 210 Fed. 878, at p. 880; *In re Shawsheen Dairy* (1942), 47 Fed. Supp. 494, 51 A. B. R. (N. S.) 347; *In re Mead-Haskell*, 47 Fed. Supp. 997.)

A state which claims a penalty should not be permitted to share assets with creditors, or the estate may be wiped out not by debts but by penalties. (*In re Birch*, 89 Fed. Supp. 249.)

The surety has no greater rights than the State.

3. A decision of the highest state court perpetually enjoining a judgment creditor on the ground of a discharge in bankruptcy raises a federal question which may be reviewed by this Court.

Palmer v. *Hussey*, 119 U. S. 96.

The merger of the original debt or obligation into a judgment does not take away the power of the bankrupt court to inquire into its provability (*Woodruff* v. *Heiser*, 10th Circuit, 150 Fed. 2nd 869, at page 870). This principle of law is cited and approved in *Heiser* v. *Woodruff*, 327 U. S. 726. Nor does the judgment have the effect of bringing the claim within the operation of a discharge in bankruptcy (*Gilchrist* v. *Cotton*, 148 N. E. 435; *Dunbar* v. *Dunbar*, 190 U. S. 340). Nor is a judgment on a penalty a *debt* within the meaning of the Bankruptcy Act (*Boynton* v. *Ball*, 121 U. S. 457; see also *Audubon* v. *Shufeldi*, 181 U. S. 577).

4. The decision of the lower Court is at variance with previous decisions of the highest court of the State of New York.

The Court of Appeals of New York has held firm in supporting the right of subrogation, referring to it as "the mode which equity adopts to compel the ultimate payment of a debt by one who in justice, equity and good conscience ought to pay it." *Arnold* v. *Green*, 116 N. Y. 566, 571; and in *Pittsburgh Westmoreland Coal Co.* v. *Kerr*, 220 N. Y. 137, it speaks of subrogation as "not founded upon contract nor upon the absence of contract but * * * upon principles of natural justice"; and again in *Pease* v. *Egan*, 131 N. Y. 262, 272, "no contract is necessary upon which to base the right (of subrogation) for it is founded upon principles of equity and benevolence * * *". In *Banca Commerciale Italiana Trust Co.* v. *Clarkson*, 274 N. Y. 69, the Court has allowed the subrogated surety to sue in the name of its insured on the theory that the insured is a trustee of an express trust, and has permitted a surety to punish a defaulting fiduciary for contempt of court. *Townsend* v. *Whitney*, 75 N. Y. 425; *People* v. *Sheriff*, 254 N. Y. 527.

The decision, to the extent that it constitutes an attack on the surety's right of subrogation, is at variance with the letter and the spirit of the foregoing cases.

to be re-
xcise Bond
rance com-
on. These
cally every
ny of such
referred to
. Besides,
xcise bonds
is decision.

5. The importance of the decision sought to b
versed may be seen from the motion of the Excise
Underwriters and its twenty-eight member insurance
panies, made at the same time as this petition. Ma
insurance companies write insurance in practically
other state in the union and, since a great many of
states have alcoholic control laws, the losses refer
of these insurance companies are multiplied. Be
there are numerous other companies writing excise b
throughout the country affected directly by this deci

Conclusion.

lly prayed
be granted
d from be

For the foregoing reasons, it is respectfully pra
that this petition for a writ of certiorari be gra
and that execution of the judgment appealed fro
stayed pending its review by this Court.

Respectfully submitted,

KERMAN,
Petitioner.

WILLIAM J. JUNKERMA
Attorney for Petitio

JESSE S. RICHMAN,
Of Counsel.

IN THE
SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, 1950.
No. .

HARTFORD ACCIDENT AND INDEMNITY COMPANY,
of 110 William Street, New York City,
Petitioner,

—against—

PAULINE CASALINO.

MOTION TO FILE A BRIEF AS *AMICUS CURIAE.*

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Excise Bond Underwriters, Inc. of 130 William Street, New York City, an association consisting of the following insurance companies writing excise bonds in the State of New York:

Aetna Casualty & Surety Company
American Bonding Company
American Employers Insurance Company
American Surety Company of New York
Century Indemnity Company
Columbia Casualty Company
Commercial Casualty Insurance Company

Continental Casualty Company
Employers Liability Assurance Corp., Ltd.
Fidelity & Casualty Company of New York
Fidelity & Deposit Company of Maryland
Fireman's Fund Indemnity Company
Glens Falls Indemnity Company
Great American Indemnity Company
Hartford Accident and Indemnity Company
Indemnity Insurance Co. of North America
London & Lancashire Indemnity Co. of America
Maryland Casualty Company
Massachusetts Bonding & Insurance Company
Metropolitan Casualty Insurance Co. of N. Y.
National Surety Corporation
New Amsterdam Casualty Company
New York Casualty Company
Seaboard Surety Company
Standard Accident Insurance Company
United States Casualty Company
United States Fidelity & Guaranty Company
United States Guarantee Company

respectfully moves this Court for an order granting it leave to file a brief as *amicus curiae*.

Although your petitioner is not a party to the action herein, its member insurance companies underwrite practically all excise bonds issued in the State of New York and will be prevented from recouping a large percentage of their losses if the decision herein stands.

The premium rates fixed on excise bonds are determined in part by the right to recoup from defaulting principals and, if a discharge in bankruptcy releases the principal from such liability, the insurance companies associated with your petitioner will sustain a great loss.

In addition, practically all of the said member insurance companies have judgments against defaulting principals, which will become invalid by reason of the decision of the Court of Appeals, at a great financial loss to said companies.

In the Appellate Division of the State of New York, First Department, and in the Court of Appeals of the State of New York, a similar application was granted and briefs as *amicus curiae* were submitted in both courts.

It is, therefore, respectfully requested that the Court grant leave to petitioner to file with this Court a brief as *amicus curiae*.

Dated: New York, January 16, 1951.

WILLIAM J. JUNKERMAN,
Counsel for Petitioner, Excise Bond Underwriters, Inc.

GEORGE F. BLAKE,
Of Counsel.

APPENDIX A.

Alcoholic Beverage Control Law, Section 108 (New York State):

> "No licensee except the holder of a winery license shall keep or permit to be kept or consumed on the licensed premises any alcoholic beverage except the alcoholic beverages which he is permitted to sell under the terms of the license issued to him."

Title XI, U. S. C. A., Section 93J:

> "Debts owing to the United States or any State or subdivision thereof as a penalty or forfeiture shall not be allowed, except for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby and such interest as may have accrued thereon according to law."

Title XI, U. S. C. A., Section 35:

> "Debts not affected by a discharge. A discharge in bankruptcy shall release a bankrupt *from all his provable debts* except such as (first) are due as a tax levied by the United States, the State, County, District or Municipality in which he resides; * * *."

APPENDIX B.

Opinion at Motion Term.

Hartford Accident & Indem. Co. v. *Casalino.*—Motion to cancel and discharge judgment against bankrupt. The respondent, as surety, gave its bond pursuant to agreement with the movant. The bond was required by the State Liquor Authority upon issuing a license to movant to insure her compliance with the Alcoholic Beverage Control Law. That the security was in the nature of a penalty cannot be disputed. The movant was found guilty of violation of the aforesaid law and the bond was declared forfeited. The surety thereupon paid the state the full amount of the bond and brought suit against the movant for that amount. From a reading of the complaint in that action and considering the fact that the four-month contractual limitation contained in the bond had expired before the commencement of the action it is clear that the surety enforced its rights to reimbursement rather than as a subrogee of the state. Sometime after the surety obtained judgment in the action the movant went into bankruptcy. The surety did not assert its judgment at the proceeding but has waited and now seeks to levy execution on the judgment after movant's discharge in bankruptcy.

It is movant's contention that the judgment debt was discharged in bankruptcy. It is respondent's contention that the bond was a penalty due the state and under the Bankruptcy Act (U. S. C. A. sec. 93-j), was not dischargeable in bankruptcy, citing *In re Abramson* (210 Fed. 878).

The Court finds that the debt was dischargeable in bankruptcy under the circumstances. As the debt was paid in full before bankruptcy the surety became the creditor

and the state was eliminated (*Wright* v. *Rumph*, 238 Fed. 138). While it is true that the surety was subrogated to the rights of the state it never sought to enforce those rights and there is some question as to whether it could have in the view of the four-month limitation contained in the bond (*Continental Cas. Co.* v. *Nat. Slovak Sokol*, 269 N. Y. 283).

The surety having obtained its judgment on the theory of indemnification it is entitled to no better position than that of a general creditor. The protection of the section 93-j will be transposed from the state to the surety only if the surety stands in the place of the state and not when the surety has acted on its own agreement with the debtor (*In re Friedlin*, 21 Fed. Supp. 542). Accordingly the motion is granted. Settle order.

FILED
FEB 2 1951
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1950
No. 501

HARTFORD ACCIDENT AND INDEMNITY COMPANY,
of 110 William Street, New York City,

Petitioner,

against

PAULINE CASALINO,

Respondent.

RESPONDENT'S MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BERNARD A. GROSSMAN,
Attorney for Respondent,
One Wall Street,
New York 5, N. Y.

SAMUEL JACOBS,
Of Counsel.

APPELLATE PRESS CORP., 41 MURRAY STREET, N. Y., CORTLANDT 7-7627

INDEX

	PAGE
Statement of the Case	1
The Question Presented	3
The Gravity of the Question	4
The State Court Was Right on the Facts and on the Law. Its Rulings Raise no Federal Question, and Give no Jurisdiction for Review	5
Conclusion	7
Appendix A	8

Table of Cases Cited

Continental Cas. Co. v. Nat. Slovak Sokol, 269 N. Y. 283	6
Dailey, In re, 19 Fed. 2nd 95	6
Friedlin, In re, 21 Fed. Supp. 542	6
Tenant v. U. S. F. & G. Co., 17 Fed. 2nd 38	6
Williams v. U. S. F. & G. Co., 236 U. S. 549	6

Other Authorities Cited

New York Debtor and Creditor Law, Section 150	2
Title XI, U. S. C. A., Section 93J	2

IN THE

Supreme Court of the United States

October Term, 1950

No.

HARTFORD ACCIDENT AND INDEMNITY COMPANY,
of 110 William Street, New York City,
Petitioner,

against

PAULINE CASALINO,
Respondent.

RESPONDENT'S MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement of the Case

Hartford Accident and Indemnity Company, hereinafter referred to as petitioner, for a fee (fol. 44) furnishes indemnity bonds. That is its business (fol. 75).

In 1934, it executed and delivered to the New York State Liquor Authority, its bond (fols. 52-60)—whereunder it bound itself to pay all penalties, up to one thousand ($1,000) dollars, that said Authority might fix against Pauline Casalino, a licensee, and hereinafter referred to as respondent, for any violation by her of her liquor license.

In 1935, there was a violation (fol. 78); a penalty of one thousand ($1,000) dollars (fol. 79); and payment thereof by petitioner (fol. 80).

In 1936, petitioner sued respondent to recover this payment (fols. 73-81). The suit sounded solely in contract:

specifically (fol. 77) that "defendant (respondent here) agreed to indemnify plaintiff (petitioner here) and save it harmless from and against any and all liability, losses * * * that plaintiff might sustain by reason of having executed said bond." The complaint then recites the loss under its bond (fol. 80); demand on respondent to indemnify it for said loss (fol. 80); failure to do so (fol. 81); and demand for judgment (fol. 81).

Petitioner was awarded judgment.

In 1942, respondent filed a voluntary petition in bankruptcy (fol. 27), and on due proceedings thereunder (fol. 31) was awarded a discharge from all debts, except such as were, by the Bankruptcy Act, excepted from the operation of a discharge (fol. 32).

Petitioner knew of the proceeding (fol. 40), but did not oppose it (fol. 31), and did not seek in the proceeding a limitation that said discharge was not operative against its claim.

Yet, having been scheduled by the bankrupt, it was a party in interest, and had standing to do so.

In 1949, respondent applied, under the provisions of the New York Debtor and Creditor Law, Section 150 (Appendix A) to have petitioner's judgment marked cancelled of record, on the ground that it had been made inoperative by the discharge in bankruptcy (fol. 28).

Petitioner opposed, on the ground that it was subrogated to the rights and remedies of the Liquor Authority (fol. 42); for the bond it had issued so stipulated (fol. 57); and petitioner urged in opposition, that since the claim of the said Authority was for a penalty, and so was not provable, not dischargeable in bankruptcy (Title XI, 93J), that therefore, as subrogee, it also had a claim non-provable, non-dischargeable in bankruptcy (fol. 40).

The State court, however, ruled that petitioner's claim, as a matter of fact, and of law, was one for indemnification (fol. 17), and not by way of subrogation.

Petitioner claims this ruling is error, and that it raises a federal question; respondent opposes.

The Question Presented

The fundamental question presented, then, is not as put by petitioner, but is: did anything pass to petitioner by subrogation, and if so, just what.

And that is not a federal question.

Petitioner argues that it is the penalty due that passes, and that a penalty is non-provable, non-dischargeable in bankruptcy.

Thus, what petitioner maintains, in effect, is that if the penalty were a fine, or imprisonment on non-payment of such fine, that it, the insurance company that paid it, would as subrogee inherit the right to imprison the debtor until re-payment.

Or: may government sell to business the franchise of imprisonment for debt.

Respondent, on the other hand, claims that what passed in this case, as a matter of fact and of law, was entirely for state court determination, and did not arise under any federal statute; and that the State court has held, as a matter of fact, and a matter of law, that the penalty provision did not pass, and that petitioner is a general creditor with a breach of contract claim.

In short, there is no federal question.

The Gravity of the Question

There are thousands of little bars and grills across the State of New York, servicing their districts with the advantages that come with bibulating and social intercourse in such places. But government will not franchise them for this public service without a bond (fols. 40, 41). Petitioner, and at least the 28 other companies who now seek to intervene in this proceeding (petition, pp. 11, 12), are the source of the bonds that make these bars possible. Apparently, they execute and deliver them without security (fols. 43, 44) other than the applicant's personal promise to hold them harmless thereunder from loss.

There is glamour in the conviviality and jollity of the business, and easy bonds for bars has attracted to it operators who cut corners and end up with a penalty collected by government on the bond.

These bonding companies have had great financial loss (petition to intervene, pp. 12, 13). If they had demanded security of these bar-keepers, as they do of a lawyer who requires a bond on appeal, then bankruptcy would not invalidate their protection (fol. 44). To now make their unsecured claims non-dischargeable in bankruptcy, would be to pro-tanto nullify the theory and purpose of the Bankruptcy Act, and to create a preference for a special segment of business, and to endow it with the rights of government.

The State Court Was Right on the Facts and on the Law. Its Rulings Raise no Federal Question and Give No Jurisdiction for Review

When petitioner sued respondent in 1936, it sued in its own name, as plaintiff (fol. 74). It sued in its own right (fol. 75). As found by the State court: "it acted on its own agreement with the debtor" (fol. 17); namely (fol. 77) an agreement by respondent to pay back to petitioner any monies petitioner might be required to pay out to government under the bond.

Petitioner, to safeguard itself, could have demanded security, but didn't. It was prepared to do business without collateral. It was moved by its fee received (fol. 44) and content with a promise to be held harmless. In 1936, it was suing to enforce that promise (fol. 80).

The outcome is a matter entirely for state determination.

The State court found as a matter of fact that "it is clear that the surety enforced its (own) rights to reimbursement rather than as a subrogee of the state" (fol. 14). But regardless of what position petitioner took in said suit, the State court finds: "as the debt (the penalty) was paid (by petitioner) in full before bankruptcy the surety became the creditor and the state was eliminated (fol. 16); and the surety having obtained its judgment on the theory of indemnification it is entitled to no better position than that of a general creditor" (fols. 16, 17).

These were all matters of fact and of law for State court determination; and raised no federal question.

The State court even found, as a matter of state law, that by virtue of the time limitations of the contract of indemnity (fol. 58) that the State was foreclosed from suit for its penalty (fol. 16) and hence, petitioner had the

same limitation as subrogee (fol. 16) (citing *Continental Gas Co.* v. *Nat. Slovak Sokol,* 269 N. Y. 283).

This, too, was a matter for State court determination; and this, too, presents no federal question, and determines the right of subrogation against petitioner.

Petitioner's paying of the penalty, therefore, is a pecuniary loss. *Tenant* v. *U. S. F. & G. Co.,* 17 Fed. 2nd 38; In *re Dailey,* 19 Fed. 2nd 95. And the claim on it is provable in bankruptcy. In *re Friedlin,* 21 Fed. Supp. 542. And is dischargeable in bankruptcy. *Williams* v. *U. S. F. & G.* 236 U. S. 549.

It is just as though a dear friend, to save a friend from a jail sentence, had loaned him the money to pay the penalty. It would be a debt for money had and received: provable and dischargeable in bankruptcy. The only difference here is that petitioner does it as a business, for a fee.

Either way, government as a creditor is eliminated, and new faces, and new juridical relationships have come into being.

That, too, is a matter for State court determination, and presents no federal question.

That the parties stipulated by their agreement that the petitioner may have all the rights and remedies of enforcing a penalty (fol. 57) does not make the desired result effective. It is as ineffective as stipulating, in an agreement, that the debt covered thereby should be non-dischargeable in bankruptcy. It would be against public policy.

Conclusion

What the parties stipulated in their contract of indemnity, and what they did thereunder, and the legal effect thereof: whether it be subrogation, or a new juridical relationship, are all questions for State court determination.

There is no federal question here, and the petition for a writ of certiorari should be denied.

Respectfully submitted,

BERNARD A. GROSSMAN,
Attorney for Respondent.

SAMUEL JACOBS,
Of Counsel.

APPENDIX A

New York Debtor and Creditor Law, Section 150

Discharge of bankrupt from judgment.—At any time after one year has elapsed, since a bankrupt was discharged from his debts, pursuant to the acts of congress relating to bankruptcy, he may apply, upon proof of his discharge, to the court in which a judgment was rendered against him * * * for an order, directing the judgment to be cancelled and discharged of record. If it appears upon the hearing that he has been discharged from the payment of that judgment or the debt upon which such judgment was recovered, an order must be made directing said judgment to be cancelled and discharged of record.

FILED
FEB 12 1951
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 501.

HARTFORD ACCIDENT AND INDEMNITY COMPANY,
of 110 William Street, New York City,
Petitioner,

—against—

PAULINE CASALINO.

REPLY BRIEF OF PETITIONER TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

WILLIAM J. JUNKERMAN,
Attorney for Petitioner,
80 Broad Street,
New York City.

JESSE S. RICHMAN,
Of Counsel.

THE COURT PRESS, N. Y. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 501.

HARTFORD ACCIDENT AND INDEMNITY COMPANY,
of 110 William Street, New York City,
Petitioner,

—against—

PAULINE CASALINO.

REPLY BRIEF OF PETITIONER TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

The Respondent on the bottom of page 5 of his brief states:

> "The State court even found, as a matter of state law, that by virtue of the time limitations of the contract of indemnity (fol. 58) that the State was foreclosed from suit for its penalty (fol. 16) and hence, petitioner had the same limitation as subrogee (fol. 16) (citing *Continental Cas. Co.* v. *Nat. Slovak Sokol*, 269 N. Y. 283)."

There is nothing in the bond that would have limited the time of the State from proceeding against the principal for the penalty in the event of non-payment by the surety (fols. 52-60). Special Term appears to have misinterpreted *Continental Casualty* v. *Sokol*,

269 N. Y. 283, since the Court of Appeals at page 290 said that the action is "not on the bond", "and plaintiff is not barred from maintaining this action by reason of the limitation of time set forth in the bond."

As in the *Sokol* case, this action was not upon the bond since only the State had the right to enforce the bond. Neither the Appellate Division, nor the Court of Appeals, rendered any opinion, and it cannot be said that those courts concurred with Special Term in its interpretation of the *Sokol* case.

Respectfully submitted,

WILLIAM J. JUNKERMAN,
Attorney for Petitioner.

JESSE S. RICHMAN,
Of Counsel.

Dated: New York, February 6, 1951.